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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 785

NATIONAL GARMENT COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION AND SUPPORTING BRIEF FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Eighth Circuit.

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SUPREME COURT OF THE UNITED STATES.

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No. .....

NATIONAL GARMENT COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, Eighth Circuit.

Now comes the National Garment Company, a Missouri corporation with offices in St. Louis, Missouri, and prays that a Writ of Certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals, Eighth Circuit, entered on February 5, 1948, enforcing an order of the National Labor Relations Board.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals in this connection is set out in National Labor Relations Board v. National Garment Company et al., **166 F. 2nd 233.** The order of the National Labor Relations Board is set out in **69 N. L. R. B. 1208** (Transcript pages 71-74).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

A petition (Transcript page 70) was filed on May 16, 1947, by the old National Labor Relations Board in the United States Circuit Court of Appeals, Eighth Circuit, for enforcement of its order issued on August 6, 1946, against the National Garment Company and the Wells-Wear Company.[1] The order provided for posting of notices; for reinstatement of one employee with back pay; back pay for 19 other employees (who were re-employed before the complaint of the Board was filed); and contained conventional cease and desist provisions, and a requirement to bargain collectively with a certain union.

Before the case was submitted the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. 151) was amended on the 23rd of June, 1947 (Public Law 101, 80th Congress, Chap. 120, 1st Sess. H. R. 3020; 29 U. S. C. A. 151) in the following respects material to issues herein:

a) Quality of evidence to be considered in Board proceedings [Section 10 (b)].[2]

b) Amount of evidence essential for Board findings and actions [Section 10 (c)].[3]

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1 The National Garment Company is the sole petitioner herein as the Wells-Wear Company is out of business and no longer has a corporate existence.

2 The amended Act, Section 10 (b), requires that proceedings on a complaint of the Board "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . .", whereas the old Act, Section 10 (b), stated specifically: "In any such proceeding the rules of evidence prevailing in Courts of law or equity shall not be controlling."

3 The amended Act, Section 10 (c), requires the Board to state its findings of fact based "upon the preponderance of the testimony taken." The old Act, Section 10 (c), permitted the Board to state its findings of fact based "upon all the testimony taken."

c) Essentials in record as a basis for judicial enforcement of Board action by U. S. Courts [Section 10 (e)].[4]

d) Back pay orders which may be made by Board [Section 10 (c)].[5]

e) The amendments[6] were to become fully effective August 22, 1948 (Section 104).[7]

The amendments were called to the Court's attention; and it was pointed out that the order of the old Board up for enforcement did not contain findings prerequisite to enforceable orders of the new Board under Section 10 (c) of the Act as amended.[8]

However, as will be seen from the opinion, the Board's petition was ruled on "as of the date of issuance of the order" without giving effect to the aforesaid amendments. The decree nevertheless was issued February 5, 1948. The Court also ruled that the "General Savings Statute"

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4 The amended Act, Section 10 (e), provides as a standard for the Court on reviews of Board orders: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." The old Act, Section 10 (e), read: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive."

5 Section 10 (c), with reference to affirmative action which the Board can order upon proper findings to effectuate the policies of the Act was amended by inclusion of a new provision, reading: "Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

6 Text of applicable amendments is set out in Appendix, commencing page 25.

7 Sec. 104 (Public Law 101, 80th Congress, Chap. 120, 1st Sess. H. R. 3020) reads: "The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by Section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith."

8 For applicable excerpts from House Conference Report No. 510, June 3, 1947, see Appendix, page 30.

(1 U. S. C. A. 29)[9] with reference to effect of **repealing** statutes was applicable to the **amendatory** "legislation here under consideration."

Petitioner urged before the appellate court that the Board's order with reference to back pay, which was not coupled with an order of reinstatement, was beyond the authority of the board, citing **N. L. R. B. v. Carlisle Lumber Co.** (9th Cir.), 99 F. (2d) 533, 537, and the language contained in the amendment to Sec. 10 (c).[10] The Court, in disposing of the issue, cited its own ruling in **N. L. R. B. v. Skinner & Kennedy Co.**, 113 F. (2d) 667, 669 (July 25, 1940), as contrary to the decision in the Carlisle Lumber Co. case, and the Court added, "We think our ruling is in accord with Phelps-Dodge Corp. v. N. L. R. B., 313 U. S. 177, 197-200, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217, and N. L. R. B. v. Link Belt Company, 311 U. S. 584, 61 S. Ct. 358, 85 L. Ed. 368." However, the Court did not pass upon the effect of the above-cited amendment on the power of the Board to issue an order for back pay not coupled with an order of reinstatement.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C., paragraph 347 (a)]. The Judgment and Decree of the Court of Appeals was entered on February 5, 1948, on the same date that "Petition for Rehearing" and "Objections to Proposed Decree" were overruled (Transcript [Fol. 36] page 32).

QUESTIONS PRESENTED.

1. Whether the Court, on a petition for enforcement of a Board order, must apply the new standards for Board and Court action contained in the National Labor Rela-

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9 For text, see Appendix, page 33.

10 See Footnote 5.

tions Act as amended,[11] and in effect at the time of its ruling?

2. Whether a Board's order [which, under Sec. 10 (e) of the Act (before or after amendments) could be enforced, modified, or enforced as modified, or set aside in whole or in part by the Court] is of such final nature that the Board may not be required to conform to new standards for Board action contained in remedial legislation in effect after rendition of the Board's order and before an enforcement decree is entered?

3. Whether the Board under sec. 10 (c) of the Act,[12] before its amendment, could issue an enforceable order for back pay unless coupled with an order of reinstatement for the same employees, and if the answer is in the affirmative, whether a court in an enforcement proceeding after the amendment to Sec. 10 (c), with reference to back pay orders,[13] can disregard the effect of the amendment?

4. Whether the General Savings Statute (16 Statutes 431, 1 U. S. C. 29)[14] pertaining to effect of **repealing** legislation has any bearing on construction of **amendments** to the National Labor Relations Act so as to prevent a reviewing court from applying an amendment to the Act, Sec. 10 (c), with reference to back pay orders, or new standards set out in amended Act controlling Board and Court action?

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11 (Public Law 101, 80th Congress, Chap. 120, 1st Sess. H. R. 3020, known as "Labor Management Relations Act 1947"). For details see footnotes 2, 3, 4, 5, 6, 7, 8.

12 (49 Statutes 449.)

13 See Footnote 5.

14 For text, see Appendix, p. 33.

REASONS FOR GRANTING THE WRIT.

1. The questions presented are of great public importance involving application of amendments to the National Labor Relations Act (Public Law 101, 80th Congress, Chap. 120, 1st Sess. H. R. 3020, June 23, 1947) not heretofore ruled on by this Court. The pertinent amendments are specified under our "Summary Statement of Matter Involved." They pertain to quality of evidence, standards for valid Board orders and Court action, and under what circumstances the Board may order affirmative action with reference to back pay.

2. The construction of the General Savings Statute (1 U. S. C. A. 29) which pertains to repealing statutes and its application to **amendatory** legislation is also a point in issue and of widespread importance.

3. The opinion of the Court of Appeals in the present case is in conflict with holdings of other circuit courts of appeals which have given effect to amendments of the Act. See **L. A. Young Spring and Wire Corp. v. N. L. R. B.** (U. S. Ct. App. D. of C.), 163 F. (2d) 905, 907 (Sept. 29, 1947), and **N. L. R. B. v. E. C. Atkins & Co.** (7th Circuit), 165 F. (2d) 659 (Sept. 24, 1947); also **N. L. R. B. v. Carlisle Lumber Co.** (9th Circuit), 99 F. (2d) 533, 537 (October 15, 1938), pertaining to limitations on authority of the Board to order back pay unless coupled with an order of reinstatement.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. .....

NATIONAL GARMENT COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF

In Support of Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals in question is National Labor Relations Board v. National Garment Company et al., **166 F. 2nd 233**. The order of the National Labor Relations Board is set out in **69 N. L. R. B. 1208** (Transcript pages 71-74).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C., paragraph 347 (a)]. The Judgment and Decree of the Court of Ap-

peals was entered on February 5, 1948, on the same date that "Petition for Rehearing" and "Objections to Proposed Decree" were overruled (Transcript [fol. 36] page 32).

STATEMENT OF THE CASE.

The accompanying petition for certiorari sets out the salient facts in the case.

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Court of Appeals, Eighth Circuit, erred:

1. In failing to apply the standards for **Board** action in the Act as amended[15] [Sections 10 (b) and 10 (c)] and in effect at the time of submission of the petition for enforcement.

2. In failing to apply the standards for **Court** action in the Act, as amended [Section 10 (e)] and in effect at time petition for enforcement was submitted for Court action.

3. In ruling in **1948** on the petition for enforcement "as of the date of the issuance of the order" without giving effect to amendments of the National Labor Relations Act [Sections 10 (b), 10 (c) and 10 (e)] which became fully effective (Section 104) August 22, **1947.**

4. In ruling that the Board under Section 10 (c) of the Act[16] was empowered to order back pay for workers who had resumed their employment before Board action.

5. In failing to pass upon the significance of the amendment to Section 10 (c) pertaining to back pay orders.[17]

6. In ruling that because of the "General Savings Statute" (16 Statutes 431, 1 U. S. C. 29) which pertains to effect of **repealing** legislation, "all things done" under the old law must stand, despite the **amendments** to Sections 10 (b), 10 (c) and 10 (e) then in effect, and the fact the National Labor Relations Act was **amended**—and not **repealed.**

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15 Public Law 101, 80th Congress, 1st Sess., H. R. 3020.

16 National Labor Relations Act, 49 Stat. 449; 29 U. S. C. A. 160.

17 Section 10 (c), with reference to affirmative action which the Board can order upon proper findings to effectuate policies of the Act, was amended by inclusion of a new provision, reading, "Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

ARGUMENT.

The Abuses Under the Act Were so Intolerable That the Amendments Under Consideration Were Enacted by Way of Remedy.

The amendments to the National Labor Relations Act became wholly effective on August 22, 1947. The only savings provisions in the amended act are to be found in Sections 102 and 103.[18]

The abuses under the old Act called for remedial legislation. A compendium of the abuses may be found in the House Conference Report No. 510, June 3, 1947.[19] We shall not repeat them. In order to remedy the shocking injustices described in the report, which cited numerous court decisions by way of illustration, the amendments to the Act in present form were finally agreed on. With reference to them, the Report[20] states:[21]

> "The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by **substantial evidence on the record considered as a whole.** The provisions of section 10 (b) of the conference agreement insure the Board's receiving only legal evidence, and section 10 (c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts **will hereafter be called upon**

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18 For text see Appendix, pp. 29-30.

19 Relevant excerpts from House Conference Report are contained in Appendix, p. 30.

20 Congressional Record, Vol. 93, p. 6467.

21 See pp. 17-20 of monograph, "Analysis of Labor Management Relations Act, 1947," by Gerhard P. Van Arkel, former general counsel of National Labor Relations Board, published by Practicing Law Institute.

> **to determine**—whether the requirements have been met. This, in conjunction with the language of the Senate Amendment with respect to the Board's findings of fact—language which the conference agreement adopts—**will very materially broaden the scope of the court's reviewing power.** This is not to say that the courts will be required to decide any case de novo, themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others **without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings.''** (Emphasis ours.)

The evils in the administrative process Congress sought to cure with the amendments were not limited by any savings clauses.

We repeat that after August 22, 1947, with the exception of the few items referred to in Sections 102 and 103 of the amended Act, the Act as amended became fully operative.

In Construing Amendments, the Evils Arising Under the Old Law and the Remedy Provided by the Amendment Should Be Considered, and That Construction of the Amended Act Should Be Adopted Which Will Best Repress the Evils and Advance the Remedy.

In **McClure v. United States**, 95 F. (2d) 744 (9th Circuit), the opinion deals with statutory construction and the effect of amendments. It quotes from **Blair v. Chicago**, 201 U. S. 400, 475, 26 S. Ct. 427, 446, 50 L. Ed. 801, as follows:

> "'The rule was thus stated in Farrell v. State, 54 N. J. Law 421, 24 A. 725: "As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended . . ."'"

See **Connett v. City of Jerseyville,** 96 F. (2d) 393, 400 (7th Circuit), for illuminating discussion; **Kindleberger v. Lincoln Natl. Bank of Washington,** 155 F. (2d) 281 (Ct. of App. D. C.); **Bowles v. Strickland,** 151 F. (2d) 419, 420 (5th Circuit).

59 C. J., p. 1093 et sequitur, with reference to the construction of amendments, reads:

> "The intention of the legislature is the primary object in the construction of statutory amendments . . . and in arriving at the intent, the court may look to the body of the act, its caption, and its emergency clause . . . The old law should be considered, the evils arising under it, and the remedy provided by the amendment, and that construction of the amended act should be adopted which will best repress the evils and advance the remedy . . ."

The Court on Petition for Enforcement of a Board Order Must Apply the New Standards for Board and Court Action Under the Act as Amended.

The new Board appointed and existing under and by virtue of the amendments to the Act, prosecuted the petition for enforcement of the pending order after August 22, 1947. In effect, it made the Order its own. The only kind of orders which it could make under the amended Act would have to be in conformance to Sections 10 (b) and 10 (c) of the Act as amended as well as other provisions thereof. Its findings would have to be based upon compe-

tent evidence [10 (b)] and upon a preponderance of the testimony [10 (c)]. The orders which it presses for enforcement must be administratively complete in accordance with the law under which it functions. It was never intended that two materially different administrative standards could be observed after the effective date of the amendment to effectuate the policies of the Act.

Courts in passing upon orders of the Board after August 22, 1947, function under and by virtue of the amended Act. All amendments were enacted at one time. It was not intended that some should be observed and others ignored after the effective date. The amended Act is an undivided whole and the Court in deriving its authority from the terms of the Act must consider it as amended, not only with reference to its powers and duties, but with reference to the powers and duties of the Board. We find nothing in the Act giving the Court the right to invoke its own savings clauses. To apply the law "as of the date of the order" is not applying the law under which the Court operates.

In Section 10 (e) of the Act as amended, new standards for judicial review are to be found. The standard for the Court is materially different than "as of the date of the order" it was enforcing in the case at bar. It did not follow the standards of the law under which it was functioning at the time of the submission of the matter. In Section 10 (e) we now read: "The **findings** of the Board with respect to questions of fact if supported by **substantial evidence** on the record considered as a whole shall be conclusive." (Emphasis ours.)

The word "findings" must be read together with Section 10 (c), which calls for findings "upon a preponderance of the testimony." Section 10 (c) must be read together with Section 10 (b) which calls for evidence in accordance

with the rules of evidence applicable in the District Courts of the United States.

Courts of appeal have been mindful of their duty to apply the Act as amended in judicially reviewing orders entered by the old Board. See **L. A. Young Spring and Wire Corp. v. N. L. R. B.** (Ct. App. D. of C.), 163 F. (2d) 905, 907 (Sept. 29, 1947), and **N. L. R. B. v. E. C. Atkins & Co.** (7th Circuit), 165 F. (2d) 659, 660 (Sept. 24, 1947); **Eastern Gas & Fuel Assoc. v. N. L. R. B.** (6th Circuit), 163 F. (2d) 864, 866 (Sept. 8, 1947).

Although the facts in the foregoing cases are not parallel, the courts took cognizance of the public policy set out in the law as amended at the time of its decision. The **intent of Congress** was the guiding rule for the Courts in order to effectuate the policies of the Act.

Aside from the question of the power of the Board to order back pay in the light of Section 10 (c) as amended, which we will dwell on separately, it is our contention that for a Court to apply at present the terms of an old law and bygone standards to effectuate the policies of an amended Act which contains new standards for Board and Court action is a denial of Congressional purpose and a repudiation of Congressional objectives and of the due process intended by Congress.

Board and Court Have Separate Functions and Board Orders Are Neither Final Nor Beyond Review.

We have not contended that all unenforced orders issued by the old Board are voided by the mere passage of the amendments—but that an unenforced order, like the one in issue, which does not on its face show **findings** conforming to the new standards for Board action, is not to be enforced by a court which is bound by the law as amended. In instances where orders are pending before

a Court, which are deficient in prerequisite findings for enforcement under the amended Act, the record should be remanded by the Court to the Board for appropriate findings in accordance with the Act as amended.

The Board, and not the courts, must make the prerequisite findings under Section 10 (c). In **Phelps Dodge Corp. v. N. L. R. B.**, 313 U. S. 177, 196, 85 L. ed. 1271, 1284, the Court stated:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress had defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders [Sec. 10 (e) and (f), 29 USCA, Sec. 160 (e) and (f)], it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board . . ."

Courts in enforcement proceedings have judicial functions. "The order of the Board is subject to review by the designated Court, and only when sustained by the Court, may the order be enforced." **Myers v. Bethlehem Shipbuilding Corp.**, 303 U. S. 41, 49, 82 L. ed. 638, 643. The Court has the obligation to search the record to ascertain if the order is enforceable. In doing so it must ascertain if the Board has conducted the proceedings in accordance with the law **then in effect, to effectuate the policies of the Act.** The Court has a real power of review with authority to enforce, modify, and enforce as so modified or set aside in whole or in part the order of the Board.

Injunctive Relief Must Be Determined as of the Time of the Hearing.

The order which the Board sought to enforce contained cease and desist provisions. When sustained by the Court, the order "is in effect an injunction." **N. L. R. B. v. Lipshutz,** 149 F. (2d) 141 (5th Circuit). Injunctions operate only in futuro and the right to one must be determined as of the time of the hearing. **Duplex v. Deering,** 254 U. S. 443, 464; **Texas v. Brown,** 258 U. S. 466, 474, 66 L. ed. 721, 725, 726.

In **Vandenbark v. Owens-Illinois Glass Co.,** 311 U. S. 538, 541, 85 L. ed. 327, 329, the Court restated:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

The above was by way of quotation from U. S. v. The Peggy, 1 Cranch 103, 110, 2 L. ed. 49, 51. The Court (Mr. Justice Reed) continued:

> "It is true this Court was speaking of the intervention of a treaty and also that it expressed a caution against retrospective operation between private parties but the principle quoted has found acceptance in a variety of situations."

The Court then cited several cases, including Patterson v. Alabama, 294 U. S. 600, 607, 79 L. ed. 1082, 1086; Carpenter v. Wabash Railway Co., 309 U. S. 23-29, 84 L. ed. 559, 562. Also see Ziffrin v. United States, 318 U. S. 73, 78, 87 L. ed. 621, 625; Watts, Watts & Co. v. Unione Austriaca etc., 248 U. S. 9, 21.

The General Savings Statute Pertaining to Effect of Repealing Legislation Has No Bearing on Construction of Amendments to National Labor Relations Act.

The General Savings Statute[22] enacted by Congress in 1871 which pertains to the effect of the repeal of a statute has been cited in the questioned opinion as preserving "all liabilities" arising under the National Labor Relations Act prior to its amendment, and the Court concluded that all things done in this matter under the old law must stand.

An examination of the above statute reveals that it pertains solely and strictly to **repealing acts.** In 1944 it was amended to include expiration of temporary statutes. Nowhere does it refer to amendments. Three times in its body it refers to the **"repeal"** of statutes. Section 29, being in contravention of the common law, must be strictly construed. Rodgers v. United States, 6th Cir., 158 F. (2d) 835, 836; Moore v. United States, 8th Cir., 85 F. 465, 470; United States v. Chambers, 291 U. S. 217; United States v. Auerbach, D. C. S. D., Cal., 68 F. Supp. 776.

The Labor-Management Relations Act, 1947, is not a repealing statute, but an amendatory act. It uses the words **"amend"** or **"amendment"** in six reference to the Act. **"Repeal"** is not mentioned.

An examination of the House Bill (H. R. 3020) and of the Senate Bill (S. 1126) as reported by their appropriate committees discloses that the bills were considered as amendatory to the National Labor Relations Act. There was no repealing section in either of the bills.

It follows, therefore, that the General Savings Statute, **which pertains strictly to repeals,** has no bearing on the

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22 For text see Appendix, p. 33.

construction of the amendments to the National Labor Relations Act.

An Order of the Board, Whether Under Old Section 10 (c) or the New Section 10 (c), Cannot Be Made for Back Pay Unless Coupled With an Order of Reinstatement.

Section 10 (c) of the old Act with reference to affirmative action which the Board could take read: "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action, **including reinstatement of employees with or without back pay**, as will effectuate the policies of this Act." The sentence aforesaid was amended by striking out the words "all the testimony taken" and by substituting "the preponderance of the testimony," as previously noted, and there was added to the foregoing sentence with a connecting colon, "**Provided, that where an order directs reinstatement of an employee** back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him." (Emphasis ours.) Full text of Section 10 (c) as amended is in Appendix, p. 26.

We contend that the Board, under Section 10 (c), as part of the affirmative action to effectuate the policies of the act, may not order restoration of back pay for workers who resumed their employment before the case came to the Board. And we make the foregoing assertion at this juncture without considering the amendment to Section 10 (c) relating to back pay.

In **N. L. R. B. v. Carlisle Lumber Co.**, 9 Cir., 99 F. (2d) 533 (October 15, 1938), the Court held that the Board had

no power to order the payment of back pay unless coupled with an order of reinstatement. We quote:

> "A more critical examination of the reinstatement provision is required by the contentions of respondent. The statute says that the Board may order 'reinstatement of employees with or without back pay.' While the act permits the Board to reinstate with or without back pay, it does not, I think, permit an award of back pay without reinstatement, because the back pay provision is connected with and dependent upon the reinstatement provision. It can be seen from the quoted portion of the committee report that the provisions were not placed in the act specifically to benefit employees, although they may have such effect, but were designed to insure that an employer would cease unfair labor practices. In other words, I think Congress was dealing with causes of obstructions affecting commerce, and not with the relationship of master and servant as such. For these reasons, I decline to follow Mooresville Cotton Mills v. National Labor R. Board, 4 Cir., 94 F. 2d 61, 66. It was there said that back pay might be awarded without reinstatement because it 'would not offend the terms of the act, would do justice to the worker and would tend to effectuate the policies of the act.' I think such a construction offends the terms of the act, and what would effectuate the policies of the act is a legislative question for the Board, subject only to the constitutional prohibitions applicable to all such administrative agencies. It may be that such an order could be said to 'do justice to the employee,' yet I think that the real purpose of the statute was to deal with obstructions affecting commerce and that such purpose must be controlling in a construction of the act.
>
> "The only apparent basis for a construction which would permit 'back pay' without reinstatement is by

considering that such power arises from the Board's power to order a person guilty of unfair labor practices 'to take such affirmative action * * * as will effectuate the policies of this Act' independently of the words omitted from that quotation, which are: 'including reinstatement of employees with or without back pay.' I believe that since 'reinstatement' and 'back pay' were singled out for special treatment, it was intended that the general words were to be limited thereby."

In our Motion for Rehearing (p. 8), with reference to that portion of the opinion which disagreed with the ruling in the Carlisle Case, we stated:

"The court, in overruling Respondents' contention that the order with reference to back pay was void because not coupled with an order of reinstatement and because the workers had resumed their employment before the case came to the Board, disagreed with the decision in the Carlisle Lumber Company case, 99 F. (2d) 533 (certiorari denied 306 U. S. 646). This court stated that in N. L. R. B. v. Skinner-Kennedy Stationery Co., 113 F. (2d) 667, 669, it had ruled contrary to the contention long after the decision in the Carlisle Lumber Company case. However, the court overlooked the fact that the precise point was not up for judgment in the Skinner-Kennedy case, and that no issue such as here and in the Carlisle Lumber Company case was submitted in briefs for determination.

"In the Link Belt Company case, 311 U. S. 584, cited by the court, there was no issue with reference to the right of back pay without an order of reinstatement. In a footnote to a comment on page 600, also to be found in 85 L. Ed. 379, we read: 'The Board ordered

no affirmative relief with respect to Salmons as he had been reinstated under an agreement with the company that he would not receive back pay,' but aside from whether the Supreme Court has inferentially overruled the rationale in the Carlisle Lumber Company matter, this court inadvertently failed to comment upon a most significant amendment in the present law, to which its attention was directed on page 30 of Respondents' Brief and pages 16 and 17 of their Reply Brief. That amendment to Sec. 10 (c) of the National Labor Relations Act added the following provision (emphasis ours):

> " 'Provided, **That where an order directs reinstatement of an employee,** back pay may be required **of the employer or labor organization,** as the case may be, responsible for the discrimination suffered by him.'

"We construe that to be a limitation on the right to order back pay—and a vindication of the Carlisle Case interpretation of Congressional intent."

* * * * * * *

If this Court in **Phelps Dodge Corp. v. N. L. R. B.,** 313 U. S. 177, 197-200, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217, inferentially or silently reversed the Carlisle Lumber Company decision, Congress in amending the law in a manner supporting the rationale of the Carlisle case has made the force of any such decision in the Phelps Dodge case inoperative. We quote from Sutherland on Statutory Construction, page 431, Sec. 1935:

> "If the section as amended is inconsistent with prior judicial interpretation of related sections, it is presumed that the legislature knew thereof, and the amendment controls. In the absence of express evidence to the contrary, the section as amended is to be

construed to have the same scope as the unaltered section of the original statute."

Based on all of the foregoing considerations, we conclude that an order of the Board, whether under the old Section 10 (c) or the new Section 10 (c), cannot be made for back pay where the workers resumed their employment before the case came before the Board, as there could be no order of back pay coupled with an order of reinstatement under such circumstances. The hiatus in the law with reference to the Board's powers is not accidental. The Board does not have unbridled authority. **Republic Steel Corp. v. N. L. R. B.**, 311 U. S. 7, 11, 12, 85 L. Ed. 6, 10.

IN CONCLUSION.

The granting of the Writ and subsequent decision by this Court will clarify many labor-management law problems, and be of general interest on statutory interpretation.

Respectfully submitted,

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Attorneys for Petitioner.

May 4, 1948.

APPENDIX.

Excerpts from National Labor Relations Act (49 Statute 449).

10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall

issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon all the testimony taken, the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not

been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Excerpts from Labor Management Relations Act, 1947 (Public Law 101, 80th Congress, Chap. 120, 1st Sess., H. R. 3020).

10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to

be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the

complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as

the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfac-

tion of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the

National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

Sec. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

Sec. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

Excerpts from House Conference Report No. 510, June 3, 1947.

(7)[1] In section 10 (c) the House bill provided that the Board should base its decisions upon the "weight of the evidence." The Senate amendment retained the present language of the act, permitting the Board to rest its orders upon "all the testimony taken." The conference agreement provides that the Board shall act only on the "preponderance" of the testimony—that is to say, on the weight of the credible evidence. Making the "preponderance" test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the "preponderance" test merely by the drawing of "expert" inference therefrom, where it would not meet that test otherwise. Again, the Board's decisions should

1 Congressional Record Vol. 93, p. 6467.

show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurably increased respect for decisions of the Board should result from this provision.

(14) Under the language of section 10 (e) of the present act, findings of the Board, upon court review of Board orders, are conclusive "if supported by evidence." By reason of this language, the courts have, as one has put it, in effect "abdicated" to the Board (N. L. R. B. v. Standard Oil Company, 138 Fed. [2d] 885 [1943] [13 LRR Man. 588]; see also Wilson & Co. v. N. L. R. B., 126 Fed. [2d] 114 [1942] [10 LRR Man. 354]; N. L. R. B. v. Columbia Products Corp., 141 Fed. [2d] 687 [1944] [14 LRR Man. 558]; N. L. R. B. v. Union Pacific Stages, Inc., 99 Fed. [2d] 153 [3 LRR Man. 698]). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (N. L. R. B. v. Hearst Publications, Inc., 322 U. S. 111 [14 LRR Man. 614]; N. L. R. B. v. Packard Motor Car Co., decided March 10, 1947 [19 LRRM 2397]), or when they rested only on inferences that were not, in turn, supported by facts in the record (Republic Aviation v. N. L. R. B., 324 U. S. 793 [16 LRR Man. 620]; Le Tourneau Company v. N. L. R. B., 324 U. S. 793 [16 LRR Man. 620]).

As previously stated in the discussion of amendments to section 10 (b) and section 10 (c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no longer be a factor in the

Board's decisions. While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review.

* * * * * * *

The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of section 10 (b) of the conference agreement insure the Board's receiving only legal evidence, and section 10 (c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts — will very materially broaden the scope of the court's reviewing power. This is not to say that the courts will be required to decide any case de novo, themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions.

It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in N. L. R. B. v. Nevada Consol. Copper Corp., 316 U. S. 105 [10 LRR Man. 607] and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc., cases, without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act.

General Savings Statute.

"Repeal of Statutes as Affecting Existing Liabilities.—The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability" (R. S. 13) (Act of Feb. 25, 1871, Ch. 71, Section 4, 16 Stat. 432) (Title 1, Section 29, U. S. C. A.).

Note: The above Act was amended in 1944 with reference to effect of expiration of a temporary statute.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 785.

NATIONAL GARMENT COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY TO BOARD'S BRIEF RE WRIT OF CERTIORARI.

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PETITIONER'S REPLY TO BOARD'S BRIEF RE WRIT OF CERTIORARI.

I.

The Board Obfuscates the Issues.

Questions presented by us are set out on pages 4 and 5 of our Petition. In the Board's Brief, on page 3, its recital of "Questions Presented" is not the same. The Board has attempted to skirt the issues, and as it will be seen, it ignores some in part and others in whole. We find no reference at all in its Brief to our question[1] numbered 2 and only an oblique reference to our question[2] numbered 4.

On page 16 of the Board's Brief we read, ". . . the question which Petitioner seeks to raise (Petition, 17-18) concerning the effect of the general savings statute . . . upon amending legislation is not presented," and then the Board proceeds, "In any event, as the Court below held, it is well settled by decisions of this Court that the general savings statute operates to preserve liabilities which accrue prior to amendment, as well as prior to repeal of Federal statutes (Great Northern Railway Co. v. U. S., 208 U. S. 452, 464-469)."

We have before us the case of **Great Northern Railway Co. v. U. S.**, cited by the Board, and read on page 464 that, "it is insisted by the Railway Company that the Elkins

---

1 "2. Whether a Board's order [which, under Sec. 10 (e) of the Act (before or after amendments) could be enforced, modified, or enforced as modified, or set aside in whole or in part by the Court] is of such a final nature that the Board may not be required to conform to new standards for Board action contained in remedial legislation in effect after rendition of the Board's order and before an enforcement decree is entered?"

2 "4. Whether the General Savings Statute (16 Statutes 431, 1 U. S. C. 29) pertaining to effect of **repealing** legislation has any bearing on construction of **amendments** to the National Labor Relations Act so as to prevent a reviewing court from applying an amendment to the Act, Sec. 10 (c), with reference to back pay orders, or new standards set out in amended Act controlling Board and Court action?"

Act was amended and re-enacted by Section 2 of the Hepburn Act, and that thereby a **repeal** of the Elkins Act was accomplished . . ." On the same page the Court stated:

> ". . . we concede for the sake of argument only that the effect of the amendment and re-enactment of the Elkins Act by Section 2 of the Hepburn Law was to repeal the Elkins Act, and in the light **of this concession,** we propose to determine whether the right to prosecute . . . was lost by reason of the adoption of that law." (Emphasis ours.)

The Court then applied Section 13 of the Revised Statutes (the "general savings statute") to the situation in which the Railway Company contended that a repeal was accomplished.

The Board cited on page 17 of its Brief a number of cases from appellate courts. Only one is in point. There is nothing to show the precise question up for determination before this Court was urged by the Respondent therein. (**N. L. R. B. v. Mylan Sparta Co.,** 166 Fed. [2d] 485, 488 [Sixth Circuit].) The Board also cites on page 17, **N. L. R. B. v. Sandy Hill Iron and Brass Works,** 165 Fed. (2d) 660 (Second Circuit). It will be seen (p. 662) that the Court **refused to consider the issue.** In two other cases, **N. L. R. B. v. Broven,** 166 Fed. (2d) 812 (Second Circuit), and **N. L. R. B. v. Gates City Cotton Mills** (April 16, 1948), L. R. R. M. 2965 (Fifth Circuit), the Courts **do not even mention the issue.** Finally, the Board cites **Edward G. Budd Mfg. Co. v. N. L. R. B.,** 332 U. S. 840, wherein this Court in sending a case back for review failed to grant certiorari on the question of the effect of the "general savings statute." Certainly, no inferences can be drawn from the Court's action in that matter which gave other relief to the Petitioner. It would be well for the Board to remember the statement to be found in **House v. Mayo,** 324 U. S. 42, 48, 89 Law Ed. 739, 743,

". . . but as we have often said, a denial of the certiorari by this Court imports no expression of opinion upon the merits of a case."

II.

The Court Below Did Not Apply the Standards of the Act as Amended.

The Board contends (p. 13) our assertion is without merit that the Court below applied the standards of review contained in the initial Act, rather than the Act as amended. It endeavors to dilute the force of the Court's statement which reads:

> "Our refusal to remand the case to the Board to take additional evidence was in the exercise of discretion **and the Board's petition for enforcement is ruled on in this opinion** as of the date of issuance of the order." 166 Fed. (2d) 233, 238. (Emphasis ours.)

by claiming, "the statement was directed only, however, to Petitioner's contention below . . . that the change in ownership of the Wellsville plant . . . rendered the case moot and compliance with the Board's order impossible." The quoted portion of the opinion is not susceptible to such laborious distortion. In the same paragraph from which the excerpt is taken, the court states that the **contentions** with reference to changes in ownership rendering the case moot and compliance with the order impossible **"are not considered in this opinion."** (Emphasis ours.)

But irrespective of what the Board interprets the Court to have meant, **the fact remains** the Court did not follow the standards for judicial review in effect at the time the case was submitted and ruled on. It did not hold that the findings of the Board were **"supported by substantial evidence on the record considered as a whole,"** as required

under Sec. 10 (e) of the Act then in force. In one place it refers to certain findings of the Board ". . . are supported by substantial evidence" (L. C. 238 under points 7, 8) and in another place (on page 239 under points 9, 10) the court merely stated, ". . . as to the employee, Abbie Ruth Cobb, we find the order of the Board is sustained by the evidence." We submit that such findings do not conform to the requirements of the Act as amended, nor to Congressional intent as expressed in the House Conference Report No. 510 (Appendix to Petition, p. 30).

The Court, when it acted on the Board's order had to meet the standards in the law **then** applicable for the Court's action. Those new standards, as pointed out by House Conference Report 510 (see pp. 10, 11 of our Brief) applied to Board findings as well as Court findings. If the Board's findings did not meet the prerequisites of the Act then in force, irrespective of the reason, the Court could not enforce the order. A Court's determination in such a situation would not be applying the Act retroactively, but giving it effect **then and there** as it stood.[3]

But surely, the Board in talking about prospective and retrospective effects of the Act as amended does not mean to exclude its force from pending suits.

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3 "The rule was thus stated in Farrell v. State, 54 N. J. Law 421, 24 A. 725: 'As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended. Parsons v. Circuit Judge, 37 Mich. 287. In Conrad v. Nail, 24 Mich. 275, a section in the chapter of the Code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter, in its present form, must be read as one act. The rule is correctly stated in Endlich on Statutes, Sec. 294, as follows: "A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute that it must be construed in view of the original statute as it stands after the amendments are introduced and the matters superseded by the amendments eliminated."'"

The above is quoted from **Blair v. Chicago,** 201 U. S. 400, 475, 26 S. Ct. 427, 446, 50 L. Ed. 801. When the court below, in our case, acted on review its acts **were subsequent** to the amendments and it could not ignore the law as amended then in force.

The requisites for Board and Court action apply to pending as well as future suits.[4] Congress clearly meant them to be. The savings clauses of the Act made no exception. The House Conference Report 510 (supra) is lucid. In **N. L. R. B. v. Wyandotte Transportation Co.**, 166 F. (2d) 434 (6th Circuit), not previously cited by us, we have another case of a Court recognizing the force of the law in a pending suit.[5]

III

This Court has not reversed the Carlisle Lumber case nor passed on the pertinent amendment with reference to back pay.

We note the Board concedes there is a conflict of authority as to whether back pay may be awarded in a case where employees have been reinstated prior to a Board hearing, and no order of reinstatement is involved. The amendment made by Congress to Sec. 10 (c) reads:

> "**Provided, That where an order directs reinstatement of an employee,** back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him:"

We are advised by the Board (p. 16) that the language of the proviso was "to permit the Board to assess labor organizations as well as employers for back pay." **Can labor organizations be assessed back pay, where there is no order of reinstatement?** The language permits no such construction. It likewise does not call for a different construction to the prejudice of management. This issue before the Court involves a question of substance.

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4 See Bowles v. Strickland, 151 F. (2d) 419, 420; In re Jacobs, 31 F. Supp. 620, 622.

5 In our Brief, p. 14, we discern an error in citation of Eastern Gas & Fuel Assn. v. N. L. R. B. (6th Circuit). The correct citation is 162 F. (2d) 864, 866.

IN CONCLUSION.

Our reply is, of necessity, brief. There is much more that we could amplify. But we believe the Court can at this stage without further need for suggestions determine the merits of the petition.

Respectfully submitted,

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June 9, 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 785

NATIONAL GARMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (Pl. 33-41, 44-67)[1] are reported in 69 N. L. R. B. 1208. The

[1] The printed record for purposes of the petition for writ of certiorari consists of one volume into which have been bound (1) the "Record" in the court below which contains the pleadings and the decision and order of the Board, referred to herein as "Pl."; (2) the appendix filed by petitioners in the court below, referred to herein as "R.A."; (3) the appendix filed by the Board in the court below, referred to herein as "B.A."; and (4) the supplemental proceedings in the court below referred to herein as "Supp."

opinion of the court below (Supp. 7-16) is reported in 166 F. 2d 233. A subsequent *per curiam* opinion (Supp. 31) on the Company's petition for rehearing (Supp. 17-25) and its objections to the proposed decree (Supp. 27-30) is reported in 166 F. 2d 239.

JURISDICTION

The decree of the court below (Supp. 32-35) was entered on February 5, 1948. On the same day the court entered an order (Supp. 32) denying the petition for rehearing and overruling the objections to the proposed decree. The petition for a writ of certiorari was filed May 4, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether a decision of the Board validly made under the Act prior to amendment was rendered unenforcible by the subsequent amendment which set forth decisional standards to govern Board determinations.

2. Whether the Court below properly applied the standards of judicial review set forth in the National Labor Relations Act, as amended.

3. Whether the Board's order requiring reimbursement of discriminatorily laid off employees who were reinstated prior to the Board's hearing is valid and proper.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. A., Supp. July 1947, Secs. 141, *et seq.*) are set forth in the Appendix, infra, pp. 19.28.

STATEMENT

On March 3, 1945 the International Ladies' Garment Workers Union, AFL, herein called the Union, filed charges with the Board alleging that petitioner, National Garment Company, had engaged in certain unfair labor practices at its Wellsville, Missouri plant, in violation of the National Labor Relations Act.[2] On July 12, 1945 petitioner leased this entire plant and its equipment to Wells-Wear Company which continued to operate the plant without any change in management, personnel, labor policy, or manner of doing business (Pl. 34-35, 46-48; R. A. 2-3, B. A. 4-7, 10-21, 122-125, 140-141, 146-147, 153-159, 163). Thereafter, on August 17, 1945, the Union filed amended charges with the Board alleging that both petitioner and Wells-Wear Company had engaged in unfair labor practices within the meaning of the Act (Pl. 3-5).

On August 6, 1946, following the usual proceedings under Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order

[2] Throughout this statement all references to the Act, unless specifically stated otherwise, are to the National Labor Relations Act of 1935.

(Pl. 33-41, 44-67).[3] The facts as found by the Board and as shown by the evidence, so far as material to the issues here presented are as follows:[4]

Early in February 1945 the employees at petitioner's Wellsville plant became interested in the Union (Pl. 48; B. A. 25). By February 13 a majority of the employees had signed applications for membership (Pl. 48; B. A. 26-27, 196-197). On February 21 the Union mailed a letter to petitioner at its St. Louis office informing it of that fact and requesting "a conference for the negotiations [sic] of improved working conditions and wages" (Pl. 49; B. A. 90, 198). Due to the absence of its president, Rothbarth, petitioner did not learn of the contents of this letter until his return to St. Louis at 4 p. m. on February 27 (Pl. 49; B. A. 140-143).

Within an hour after receiving such knowledge, petitioner undertook a campaign to crush the Union and to defeat its efforts to obtain collective bargain-

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[3] In these proceedings the Board found (Pl. 34-35, 46-48) upon substantial evidence that Wells-Wear Company was a branch of National Garment Company, and that the two corporations must be regarded as identical for the purpose of safeguarding the statutory rights of the Wellsville employees. The Board further found that by refusing to bargain with the Union, and by otherwise failing to remedy the unfair labor practices commenced by petitioner, Wells-Wear Company engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act, and thereupon prescribed an appropriate remedy which the court below enforced (Pl. 39-41, Supp. 33-35). Wells-Wear Company did not join in the petition for writ of certiorari (See Pet. 2, fn. 1) and no question is here raised as to the validity of the Board's findings with respect to Wells-Wear Company, or to its order against Wells-Wear based upon such findings.

[4] In the following statement record references preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

ing. A few minutes before 5 p. m. on February 27, the Wellsville plant manager, Pittker, shut off the power in the plant and informed the employees, pursuant to instructions which he had received from St. Louis, that the employees "could have the Union 100 percent if [they] wanted it, but if [they] had the Union, there would be no more bundles open" (Pl. 2, 49; B. A. 2, 28, 47-48, 62-63, 75). Pittker also told the employees that Levey, petitioner's superintendent of production, would come to the plant from St. Louis the following day to address them (*ibid.*). On the same afternoon Forelady Sievert laid off the two collarmakers who prepared shirts for assembly line processing (Pl. 53; R. A. 19, 35, B. A. 131, 169).

After working hours on that evening Mary Sievert, sister of Forelady Sievert, together with Snedeker, one of the laid-off collarmakers, composed a so-called petition "expressing opposition to the unionizing of [the] factory" and reciting also "appreciation of the kindness and cooperation" of petitioner (Pl. 49-50; B. A. 94-95, 100, 247). With the aid of four other employees, 19 signatures were obtained to the petition that evening; the employees whose signatures were solicited were told that the petition would be given to President Rothbarth, that Rothbarth would close the plant if the employees did not renounce the Union, and that the petition would help them keep their jobs (Pl. 50; B. A. 29-30, 50, 65-66, 101, 103, 247).

President Rothbarth and Superintendent Levey arrived at the Wellsville plant at 10:00 a. m. on the following morning (Pl. 50; R. A. 6, 46), and with Pittker and Forelady Sievert, immediately began to remove unassembled shirts from the shelves where they were normally kept before being worked on. The shirts were put into packing boxes of the type used in transporting goods between Wellsville and St. Louis (Pl. 50; B. A. 30-31, 44-45, 51, 215-216, 234). This operation, which was witnessed by many of the employees, was a convincing demonstration that, as Pittker had predicted on the previous day, management would close the plant rather than deal with the Union (Pl. 50; B. A. 31, 45, 51).

After lunch that day the employees were assembled to listen to addresses by Levey and Rothbarth (Pl. 50; B. A. 32, 68). Levey, after assuring the employees that they "could have" a union if they wanted one, immediately pointed out, however, that he doubted whether Rothbarth would run a union factory (Pl. 50; B. A. 68, 80-81). Rothbarth was even more forthright. He told the employees that they could belong to the Union if they wished, but that he "would not bargain" with the Union; that he did not have to keep the factory in Wellsville; and that he would rather deal with "Japs" than with the Union officials (Pl. 50-51; B. A. 32, 41, 57-58). After further disparaging the Union and its officials, he told the employees that he did not want people working for

him who could not make up their own minds and had to have other people (i.e., union representatives) make up their minds for them, that he had intended to invest his money in a new building then under construction in Wellsville, where the employees would have a good place to work, but that, instead, he would leave the building as it stood "as a monument to the people of Wellsville who cannot make up their minds and have to have somebody else make up their minds for them" (Pl. 51; B. A. 34, 58, 83).

Rothbarth also referred to the bargaining request made by the Union and bitterly chided the employees for organizing behind the Company's back (Pl. 51; B. A. 34-35, 59, 113). At the conclusion of his remarks employee Sievert sought to present to him the anti-union petition which she and Snedeker had prepared the previous evening (Pl. 51; B. A. 95, 97-98, 102, 144). Snedeker begged Rothbarth to give the employees another chance (Pl. 51; B. A. 104). Other employees, frightened and intimidated by the course of events, asked how they might regain their Union cards (Pl. 51; B. A. 34, 49, 70-71, 83). Rothbarth, after first disclaiming any interest in the matter, accepted the anti-union petition and then promptly produced a form which, he stated, might serve as an effective withdrawal from the Union if signed by the employees of their own free will before a notary public (Pl. 51-52; B. A. 33, 70-71, 81, 95, 97-98, 102, 144). Pursuant to arrangements previously made, most of the em-

ployees who had joined the Union went to the local banker after working hours and signed sworn statements revoking their Union membership (Pl. 53; B. A. 51, 63-65, 118-119, 179-197, 231).

Notwithstanding the apparent complete success of these efforts to thwart the employees in their undertaking to organize and bargain collectively, petitioner continued to implement its anti-union program by continuing the lay offs begun on February 27. All of the employees who worked on the assembly line in petitioner's plant were laid off in the order in which they completed the work which had already commenced on the morning of February 28 (Pl. 53; R. A. 3-5; B. A. 36-37, 169-177, 233). The last of them were laid off on March 29 (Pl. 53; B. A. 233). On March 13, however, while it was still laying off some of the operators, petitioner began to recall others (Pl. 54; B. A. 233). By April 3, all operators willing to return to work—except Abbie Ruth Cobb who, due to a misunderstanding, was unavailable—were again working (Pl. 54; B. A. 233; R. A. 41-43, 45).

Upon these facts, the Board found (Pl. 59) that petitioner, by its total course of conduct, by the threatening and coercive speeches to its employees, and by the lay off of its Wellsville employees interfered with restrained and coerced its employees and discriminated against them within the meaning of Section 8 (1) and (3) of the Act.[5] It also found

[5] Petitioner offered several explanations to establish that the lay offs were non-discriminatory. These explanations were not only in-

(Pl. 62) that by failing to reply to the Union's bargaining request, and more particularly by Pittker's February 27 announcement and Rothbarth's February 28 speech, petitioner clearly manifested its refusal to bargain with the Union as the representative of its Wellsville employees, thereby violating Section 8 (5) and (1) of the Act. The Board ordered petitioner to make whole the employees whom it had discriminatorily laid off for any loss of pay suffered by them as a result of the lay off; and ordered both petitioner and Wells-Wear Company [6] to cease and desist from the unfair labor practices found; upon demand to bargain collectively with the Union, upon application of employee Abbie Cobb, to reinstate her, and if they refuse to reinstate her, to make her whole for loss of wages which she may suffer as the result of such refusal; and to post appropriate notices (Pl. 39-41).

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consistent, but, as the Board found (Pl. 57-59), were not supported by the evidence in the record. Thus petitioner first averred, in its answer to the Board's complaint, that "there was no work available in various sections" (Pl. 14, 57). Plant Manager Pittker testified to the contrary, however, and ascribed the lay off to a shipment of defective goods (R. A. 6). Petitioner's final position was that a bottleneck had occurred at the collar-setter point of the production line (Pl. 57-58, R. A. 29-31; B. A. 126-129). The inconsistency of this explanation with the fact that the collar-setters themselves were laid off for several days (R. A. 4, B. A. 233), as well as with other facts set out in the Board's opinion (Pl. 57-59; R. A. 31, 39, 45-48, B. A. 117-118, 129-131, 233), impelled the Board to find, (Pl. 59), that the lay off was not motivated by legitimate business considerations but rather "was utilized as a means of discouraging the organization of the Union and of making sure that the employees lost all inclination toward organizing."

[6] See footnote 3, *supra*.

On May 20, 1947, the Board filed in the court below a petition requesting enforcement of its order (Pl. 70-74).[7] On January 7, 1948, the court below entered its opinion (Supp. 7-16) holding that the Board's findings were supported by substantial evidence, and that amendment of the National Labor Relations Act subsequent to the issuance of the Board's order did not invalidate the order or deprive the court of jurisdiction to enforce it. The court pointed out that insofar as the amendments provided for changes in procedure, these changes were not to be applied retroactively to steps taken prior to the amendments, and that the amendments did not extinguish petitioner's libilities under the initial Act. The court also rejected petitioner's contention that the Board was powerless to order an employer to pay back pay to employees who had been discriminatorily laid off, where the employer had voluntarily reinstated the employees prior to the Board's hearing.

ARGUMENT

1. Petitioner asserts that because the Board's decision does not disclose on its face that the Board applied the decisional standards set forth in Sec-

[7] Petitioner and Wells-Wear Company on June 23, 1947, petitioned the court below for leave to adduce additional evidence for the purpose of showing that subsequent to the issuance of the Board's order, petitioner had completely divested itself of any relationship to the operation of the Wellsville plant and that consequently, parts of the Board order were unenforceable (R. A. 50-52). The court below denied this motion (R. A. 52-53), holding, as set forth in its principal opinion of January 7, 1948 (Supp. 14), that any change of ownership subsequent to the Board's order did not preclude enforcement of the order.

tion 10 (c) the National Labor Relations Act, as amended (Pet. 14), the decision, though validly issued under the Act as it stood prior to amendment, may not be enforced. The contention is without merit. At the time the Board's decision was issued Section 10 (c) required the Board to state its findings of fact upon the basis "of all the testimony taken." The statute, as amended, requires that the Board "shall" make its findings "upon the preponderance of the testimony taken." The amendment on its face indicates that it is to have purely prospective operation, and is to apply solely to cases to be decided by the Board subsequent to its effective date. This reading of the amendment comports with the well-settled rule, applied by the court below (Supp. 13), that procedural changes effected by amending legislation are to be deemed applicable only to steps taken after such amendment, and are not to be deemed applicable to steps properly taken prior to the amendment. See, e. g., *United States* v. *St. Louis, S. F. & T. Ry. Co.,* 270 U. S. 1, 3; *Berkovitz,* v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261, 130 N. E. 288, 290; *Dunlap* v. *United States,* 43 F. 2d 999 (D. C. D. Idaho), appeal dismissed, 45 F. 2d 1021 C. C. A. 9); *In re Jacobs,* 31 F. Supp. 620 (D. C. N. D.). See also Sutherland, *Statutory Construction,* (3d Ed., 1943), Vol. 1, Sec. 1936, p. 438, n. 13, and Vol. 2, Sec. 2212, p. 136.

Petitioner offers no indication that Congress intended the amendment of Section 10 (c) to affect

Board decisions previously issued, and petitioner cites no case in support of its contention that the amendment should be given retroactive effect. The decision of the court below on this point accords with the holding of all other circuit courts of appeals which have considered the question (*National Labor Relations Board* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660 (C. C. A. 2); *National Labor Relations Board* v. *Brozen,* 166 F. 2d 812 (C. C. A. 2); *National Labor Relations Board* v. *Caroline Mills, Inc.,* 158 F. 2d 793 (C. C. A. 5); *National Labor Relations Board* v. *Gate City Cotton Mills,* (C. C. A. 5), decided April 16, 1948, 21 L. R. R. M. 2695; *National Labor Relations Board* v. *Mylan-Sparta Company, Inc., et al.,* 166 F. 2d 485 (C. C. A. 6); *National Labor Relations Board* v. *Austin Co.,* 165 F. 2d 592 (C. C. A. 7). There are no contrary decisions.[8]

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[8] *L. A. Young Spring and Wire Corp.* v. *National Labor Relations Board,* 163 F. 2d 905 (App. D .C.), and *National Labor Relations Board* v. *E. C. Atkins & Co.,* 165 F. 2d 659 (C. C. A. 7) are not in conflict, as petitioner alleges (Pet. 6). Like *Duplex Co.* v. *Deering,* 254 U. S. 443 and the several cases cited on p. 16 of petitioner's brief, the decisions in those cases reflect the well settled rule that the courts will not enforce orders operating *in futuro,* where those orders require action inconsistent with the then prevailing law. Petitioner also cites (Pet. 11-12) *McClure* v. *United States,* 95 F. 2d 744, 750 (C. C. A. 9), quoting from *Blair* v. *Chicago,* 201 U. S. 400, to the effect that "a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended." Petitioner fails to note that in the same paragraph, the Court limited its holding to "acts subsequently done.'" Similar limitations are found in the remaining cases cited by petitioner. See *Connett* v. *City of Jerseyville,* 96 F. 2d 392, at 400 (C. C. A. 7); *Kindleberger* v. *Lincoln National Bank of Washington,* 155 F. 2d 281 (App. D. C.); *Bowles* v. *Strickland,* 151 F. 2d 419, at 420 (C. C. A. 5).

It is to be noted that petitioner nowhere asserts that the Board's findings are not supported by a preponderance of the testimony taken.

2. Petitioner contends that the court below erred by failing to apply the standards of judicial review set forth in Section 10 (e) of the amended Act (Pet. 13). Petitioner's assertion that the court below applied the standards of review contained in the initial Act, rather than in the Act as amended, is without warrant. The court below recognized (Supp. 13), as the Board had urged (Brief for the National Labor Relations Board, p. 30), that procedural amendments affect pending cases to the extent that the particular steps to which the amendments apply were not taken prior to the effective date of the amendments. See also, *United States* v. *Hooe,* 3 Cranch 73, 78. Petitioner's contrary assumption rests solely upon a misconstruction of the statement in the court's opinion that "the Board's petition for enforcement is ruled on in this opinion as of the date of the issuance of the order" (Supp. 14). This statement was directed only, however, to petitioner's contention below (*supra,* notes 3, 7) that the change in ownership of the Wellsville plant, which occurred after the issuance of the Board's order, rendered the case moot and compliance with the Board's order impossible. Petitioner did not contend below that any of the amendments effected a change in the law on this issue and petitioner does

not here challenge the validity of the court's ruling in this respect. The issues on which that ruling was made obviously, therefore, did not involve application of the principles governing the effect to be given changes in the standards of judicial review which intervene between the date of a Board order and submission of the order to the court. Nothing in the opinion indicates that the court below, notwithstanding this holding, failed to apply the standards of review set forth in the amended Act, which was in effect at the time the court reviewed the Board's order. Petitioner does not deny that, as the facts set forth in the Statement, *supra,* pp. 3-9, show, the Board's order is amply supported by the evidence in the record considered as a whole.

3. Petitioner argues that under the Act prior to amendment, the Board was without power to order reimbursement of lost wages to employees discriminatorily laid off where, as here, the employees had been reinstated prior to the Board hearing, and the Board's back pay order was therefore not coupled with an order of reinstatement (Pet. 5, 9, 18-22). In support of this contention, petitioner cites only *National Labor Relations Board* v. *Carlisle Lumber Co.,* 99 F. 2d 533, 537 (C. C. A. 9), a decision contrary to the holding of every other Circuit Court of Appeals which has considered the question (*National Labor Relations Board* v. *Crystal Spring Finishing Co.,* 116 F. 2d 669, 672

(C. C. A. 1); *Burk Bros.* v. *National Labor Relations Board,* 117 F. 2d 686, 688 (C. C. A. 3), certiorari denied, 313 U. S. 588; *National Lebor Relations Board* v. *Dow Chemical Co.,* 117 F. 2d 455, 456 (C. C. A. 6); *Link-Belt Co.* v. *National Labor Relations Board,* 110 F. 2d 506, 511-512 (C. C. A. 7), reversed on other grounds, 311 U. S. 584; *National Labor Relations Board* v. *Skinner & Kennedy S. Co.,* 113 F. 2d 667, 669 (C. C. A. 8)), and one which has long since been discredited by the opinion of this Court in *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 197-202. Since the opinion in the *Phelps Dodge* case, no court has questioned the Board's power to order back pay, whether or not such an order is coupled with an order for reinstatement.

Petitioner further argues (Pet. 21-22) that in any event the amendment to Section 10 (c) withholds from the Board the power to issue a back pay order unless coupled with a requirement for reinstatement of employees, and suggests that this change applies retroactively so as to invalidate the Board's order, even though the order was proper when issued. Petitioner's contention that the amendment of Section 10 (c) affects the Board's power to issue back pay orders against employers is frivolous. The language of Section 10 (c) of the National Labor Relations Act which empowered the Board to issue orders requiring persons "to take such affirmative action, including reinstate-

ment of employees with or without back pay, as will effectuate the policies of this Act" was not altered by the amendment. The sole pertinent change was the addition of a proviso reading as follows: "That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him." The language of this proviso, as well as its legislative history,[9] demonstrates that its sole purpose was to permit the Board to assess labor organizations as well as employers for back pay depending solely on whether labor organizations or employers were the source of the discrimination found.

4. Because, as has been indicated above, there is no merit in petitioner's contention that the amendment to Section 10 (c) altered the Board's power to order back pay whether or not such an order is coupled with an order of reinstatement, the question which petitioner seeks to raise (Pet. 17-18), concerning the effect of the general savings statute (Act of February 25, 1871, 16 Stat. 431, 1 U. S. C. 29) upon amending legislation is not presented. In any event, as the court below held (Supp. 10-13), it is well settled by decisions of this Court that the general savings statute operates to preserve liabilities which accrue prior to amendment, as well

[9] See S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess., p. 26; H. Conf. Rep. 510, on H. R. 3020, 80th Cong., 1st Sess., p. 54.

as prior to repeal, of federal statutes (*Great Northern Ry. Co.* v. *United States*, 208 U. S. 452, 464-469). Every court which has considered the question has held that the federal savings statute preserves liabilities for back pay which accrued under the National Labor Relations Act prior to its amendment. *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works, supra; National Labor Relations Board* v. *Brozen, supra; National Labor Relations Board* v. *Gate City Cotton Mills, supra; National Labor Relations Board v. Mylan-Sparta Company, Inc., et al., supra.* Petitioner cites no contrary holdings. In *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 332 U. S. 840, the Court denied certiorari to review a question concerning the effect of the general savings clause upon liabilities which accrued prior to amendment of the Act similar to that which petitioner here seeks to raise.

CONCLUSION

The decision below is correct in all respects here challenged, and presents neither a conflict of decisions nor any question warranting review. The petition for writ of certiorari should therefore be denied.

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JUNE, 1948.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> Sec. 8. It shall be an unfair labor practice for an employer——
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> * * * * * *
>
> Sec. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said

complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to

which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings,

testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the

Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. A. 1947 Supp., Secs. 141, *et seq.*) are as follows:

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * * *

Sec. 8 (a) It shall be an unfair labor practice for an employer——

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * * *

Sec. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any

such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence ap-

plicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.

Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if

all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If

either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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